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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1546

WILLIAM BANTON MOORE, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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COMMONWEALTH OF KENTUCKY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, William Banton Moore, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the judgment of conviction entered by the Jefferson County Circuit Court, Criminal Branch, First Division, Louisville, Kentucky.

OPINIONS BELOW

The opinion of the trial court denying petitioner's motion for a new trial is not officially reported and is reprinted in the Appendix of this petition at 1a-11a. The opinion of the Court of Appeals of Kentucky affirming the conviction is reported at 489 S.W.2d 516 (1972) and is reprinted in the Appendix at 12a-16a. The mandate of the Court of Appeals of Kentucky noticing that court's denial of rehearing is at 17a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on November 17, 1972. A timely petition for rehearing was denied on February 16, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1964).

QUESTION PRESENTED

Whether the petitioner was denied his rights to confrontation and a fair trial by a summation in which the prosecutor misstated the evidence, argued facts not in evidence, expressed his personal belief in petitioner's guilt and, fundamentally, appealed to the passions and prejudices of the jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to the informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

tate deprive any person of life, liberty, or property, ithout due process of law; nor deny to any person ithin its jurisdiction the equal protection of the ws.

STATEMENT OF THE CASE

On December 9, 1970, an indictment was returned harging William Banton Moore with the wilfull mur- er of his wife, Louisa Waring Moore. On June 12, 971, after a trial by jury, petitioner was convicted of voluntary manslaughter and his sentence was fixed by he jury at imprisonment for the maximum period of 1 years.

In the early morning hours of December 5, 1970, he police were called to the suburban Louisville resi- ence of William Banton Moore. The officers were net at the door by Mr. Moore and a neighbor, Dr. Burford Davis, and taken to a second floor bathroom djacent to the master bedroom. There, in a pool of lood, lay Mr. Moore's wife, Louisa. (108-113)[1]

The police interviewed petitioner and he voluntarily gave a statement which related the following informa- ion. (155-59, 308-314) Mr. Moore, at the time a fifty- ne year old architect, lived with his wife and their win daughters. Three older children lived away from ome. Mrs. Moore had taken a shopping trip to New York on November 28, 1970. She returned in the early evening of December 4, and petitioner picked her up at the Louisville airport. They had cocktails and din- ner out, returning home at 9:00 p.m. After saying

[1] All record references will be to the trial transcript. Because of its importance to this petition, the prosecutor's summation is reproduced in the Appendix at 18a-28a. Summation references will include citations to the Appendix.

goodnight to their young daughters and the maid, petitioner and his wife went to their bedroom. A conversation ensued during which petitioner's wife brought up the subject of divorce as she had done often in the past after she had been drinking. Divorce had also been discussed earlier in the week during a phone conversation from New York. Petitioner decided to avoid any argument and sleep in another room, a patterned response to such discussions developed over years of marriage.

He went downstairs and returned briefly to the bedroom to deposit the suitcases. At this time, approximately 10:30 p.m., he did not notice his wife in the bedroom and assumed she was in the bathroom. Petitioner watched television downstairs until sometime after 12:00 a.m. and then decided to see if his wife was asleep. Again not finding her in the bedroom, he entered the bathroom where he saw her lying on the floor surrounded by blood. He attempted artificial respiration, mouth-to-mouth resuscitation and heart massage without success. He called Dr. Davis, a neighbor, who examined Mrs. Moore and told petitioner that she was dead. They then called the police.

In his written statement to the police, petitioner expressly stated that he did not strike his wife and was in no way responsible for her death. At trial, the police officers testified to interrogation beyond what was in his written statement and indicated that when he was questioned about who could have killed his wife, petitioner stated that if anyone had harmed her it would have had to be he because no one else entered the house. But petitioner emphasized that he had not harmed his wife and opined that she must have suffered a fall.

The evidence presented by the Commonwealth at trial can be succinctly summarized. It consisted of petitioner's statements with particular emphasis on his exclusion of any other possible criminal actor, and expert medical testimony that the death was caused by a criminal agency rather than an accidental fall. Dr. Lawrence Boram, a fourth-year resident in pathology who conducted the autopsy, opined that death was caused by exsanguination complicated by a cerebral contusion and a skull fracture. In Dr. Boram's opinion, the head injuries resulted from multiple blows by a blunt object. (246-280) Dr. Boram's opinion in this regard was supported by Dr. Allen Lansing, a cardiovascular specialist. (230-245) The doctors concluded that the large avulsing scalp wound could not have been caused by a single fall and pointed to numerous bruises on other parts of her body as evidence of multiple blows. Moreover, the degree to which the blood was spread throughout the bathroom meant to them that the body must have moved after the wound, further suggesting a violent force rather than an accidental fall. Both doctors conceded in cross-examination, however, that a fall could have caused the death-producing injuries.

The prosecution fortified its case by pictorial and witness accounts of the gruesome bathroom scene as well as the blood-stained clothes and other physical evidence removed from the bathroom. Mrs. Moore's head injuries caused profusive bleeding with the result that the pictures and descriptions of her lying on the bathroom floor are extremely shocking and repulsive. Sixteen 5" x 7" color photos of Mrs. Moore's body and the blood-stained bathroom were introduced, as well as five pictures as she lay naked on the autopsy table.

(Com. Ex. 1, 2, 4-17, 28, 35-39) In addition, three 16" x 16" enlargements of the most shocking pictures were admitted and displayed to the jury. (Com. Ex. 32-34) No words can convey the emotional response aroused by observations of these pictures. Blood emanated from the body in all directions with the major concentration around the head. The source of the blood was an avulsing head wound which practically scalped the back half of her skull. The three enlargements focused on her head area.

For the defense, petitioner testified substantially in accord with the earlier statement he had given the police. (393-444, 452-469) Eleven character witnesses testified to petitioner's excellent reputation in the community and his peaceful, non-violent nature. (510-552) Two of the character witnesses, Louisa MacLean petitioner's step-daughter, and Dr. Burford Davis, gave additional testimony. Mrs. MacLean, who was close to her mother, testified that her mother on occasion drank excessively. Mrs. MacLean corroborated petitioner's testimony that when Mrs. Moore had a couple of drinks she would lose coordination and had fallen several times in the past. (522-530) Dr. Davis testified to his observations when called to the Moore residence on December 5th. A thoracic surgeon, Dr. Davis was unable to give a conclusive opinion whether death was caused by a fall or from blows by an instrument, but suggested that a forensic pathologist would be more qualified to testify in this regard. (510-521)

The defense called two eminent experts in forensic pathology, Dr. Milton Helpern, medical examiner of the City of New York, and Dr. Cyril Wecht, medical

ner of Allegheny County, Pennsylvania. (370-
70-500) Each of these men testified to his con-
n, separately reached, that Mrs. Moore died as
lt of one major fall and subsequent further falls
caused the skull fracture, the major avulsing
d and the other bruises. These doctors specifically
reed with the conclusion of Drs. Boram and
ng that the origin of the death-producing injuries
multiple blows to the head for the following rea-

The avulsing scalp wound was a shearing injury which tore in one flap; there were no bruises along the edges of the flap indicative of multiple blows;

the fracture of the skull was basically lineal with a single point of origin; an egg-shaped depressed fracture would be expected if the injuries resulted from a blunt instrument, and, if from multiple blows, more than one point of fracture.

Most importantly, the autopsy reported a contre-coup injury, or injury away from the point of force. Mrs. Moore had brain injury directly below the skull fracture in the rear of the head but also suffered brain injury in the front of the head away from the point of the fracture. This pattern is typical of an injury caused by fall, that is, when the head accelerates onto a hard surface as opposed to when the head is struck by a blunt instrument;

Also of note, the amount of blood which so shocks the lay-observer of the photographs, was consistent with on-the-scene investigations of accidental deaths conducted by both forensic pathologists in their lifetime work.

Under cross-examination neither doctor could absolutely exclude the possibility of a criminal agency.

In rebuttal, the Commonwealth called certain police officers to refute testimony by petitioner and his stepdaughter that the police had indicated on December 5th that Mrs. Moore's death was an accident. (558-562) Dr. Boram was recalled to testify that Dr. Helpern had been anonymously shown photos of Mrs. Moore's body at a professional conference. Without access to the essential autopsy report, Dr. Boram testified Dr. Helpern stated the pictures portrayed a violent crime.[2] (568-73)

With the factual evidence thusly framed, the case went to the jury after final arguments by counsel. The federal question posed by this petition pertains to the closing argument of the Commonwealth. (606-622, 18a-28a) Petitioner objected throughout the summation and at its conclusion moved for a mistrial on grounds the argument overstepped the bounds of proper advocacy. (624) In his appellate brief below, petitioner urged that the improper argument had denied him a fair trial citing this Court's leading decision on prosecutorial summation, *Berger* v. *United States,* 295 U.S. 78 (1935). The court of appeals summarily dismissed this contention on the basis that the summation was within the bounds previously permitted by that court. (16a)

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[2] Because no proper foundation was laid for such cross-examination by prior inconsistent statement, Dr. Helpern never had the opportunity to explain the statement. In rejecting this point as error on appeal, the court ruled that no proper objection was taken to Dr. Boram's rebuttal testimony although petitioner specifically objected to the testimony. (565-67, 574)

REASONS FOR GRANTING THE WRIT

This petition raises a substantial question of federal law which is of particular importance because it bears directly on the integrity of the jury's guilt-determining function. In his closing argument, the prosecutor violated every proscription this Court has previously imposed upon prosecutors during summation. In *Berger* v. *United States*, 295 U.S. 78 (1935), this Court held that improper insinuations and assertions in the closing argument of a prosecutor calculated to mislead the jury were grounds for reversal where the case against the accused was not strong and the misconduct was pronounced and persistent. In *New York Central R.R. Co.* v. *Johnson*, 279 U.S. 310 (1929), the Court reversed where the closing argument of counsel in a civil case contained an improper appeal to the prejudice of a rural jury against a New York railroad company. Other decisions have indicated that arguments irrelevant to the real issues in a case and calculated to appeal to the passions and prejudices of a jury may violate the constitutional guarantee of a fair trial. See *Viereck* v. *United States*, 318 U.S. 236, 248-49 (1943); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-243 (1939). The closing argument below combined many of the improprieties previously condemned by this Court and the condonation of the prosecutorial conduct by the court of appeals conflicts with the principles of these decisions.

The *Berger* criteria of a close case, pronounced and persistent misconduct and a summation calculated to mislead are amply met here. In few, if any, criminal cases is the evidence more balanced or the danger of arousing a jury to passion above reason more acute. The jury had to resolve inter-relating credibility ques-

tions: Was the petitioner telling the truth or, more fundamentally, which set of experts was correct? For, while exceedingly shocking, the physical evidence standing alone added nothing to the rational determination of guilt or innocence without the guidance of capable, dispassionate experts.

The prosecutor was required to focus the jury's attention on these critical credibility questions and, utilizing his skill as an advocate, convince them of the correctness of the Commonwealth's position. His primary duty, was "not to convict but to see that justice was done." American Bar Association Canons of Professional Ethics No. 5 (1968). Thus, his adversary posture should have been rational discourse and not inflammatory rhetoric.

Here, perhaps because by special training, education and experience, the defense experts were more qualified than the Commonwealth's or because they gave more thorough reasons for their conclusions, the prosecutor made absolutely no effort in his summation to aid the jury's reasoned resolution of the disputed issues. On the contrary, he injected himself into the case during the argument by giving opinion and factual testimony and by directly appealing to the passions of the members of the jury. The net effect of the summation was to make the prosecutor a most important witness against petitioner while denying petitioner's right to confront him by cross-examination or even by answering argument since the Commonwealth had the last word. See *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965).

The summation covers sixteen pages. The first five are unremarkable, addressed to a summary of the prosecution's evidence. Recognizing that to convict he

had to discredit the strong defense case, the prosecutor saved his illicit ammunition for that attack and the last eleven pages are laced with improprieties. The heart of the summation was a calculated attempt to mislead the jury by conveying the unsupportable impression that the rich architect arranged to get his brother, the smart New York lawyer, to buy off the political hack doctors from New York City and Pennsylvania so they would come down to the hills of Kentucky and deceive the plain country folk of the jury.

In his earlier examinations of Dr. Helpern both in chambers and in open court, the prosecutor failed to establish facts in support of his diversionary tack. The testimony in both instances revealed that petitioner's local counsel had first contacted the doctor by sending materials on to him for study, and the role of petitioner's brother, a New York lawyer, was confined to checking on the arrival of the materials. (361-64, 365-67, 390-91) Undaunted, the prosecutor argued to the jury:

> At this point let's compare the medical opinions of Dr. Boram and Dr. Lansing with that of the paid opinions of Dr. Helpern, the New York doctor, and Dr. Wecht, the Pittsburgh doctor. We'll muddy the water with a dumb Kentucky jury. We'll come in with a smart lawyer from New York . . . We'll pull the wool over the eyes of the jury down there in the hills of Kentucky. Unable to get a doctor here, the brother of the defendant on trial, a New York lawyer who sits within the sound of my voice, got Dr. Helpern. (612-613, 21a-22a) (objections omitted)

As an appeal to sectional prejudice and class bias this argument is reprehensible. See *New York R.R. Co.* v.

Johnson, supra at 319. But the impropriety is compounded by the prosecutor's testimonial assertions[3] including a calculated misstatement of the evidence as to Dr. Helpern's retention, the unsupported statement that the defense was unable to retain a Kentucky doctor, and the patently unsupportable inference that Drs. Wecht and Helpern were paid perjurors.[4]

The summation's emotional peak occurred when the prosecutor threw a two-foot high bathroom stool

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[3] The prosecutor became a witness in several other different respects. He indicated the only way petitioner's wife could have received her injuries from a fall was if the fall had occurred from the 10th floor of the Inter-Southern Building. (612, 21a) No testimony was elicited from anyone at the trial about a fall from the Inter-Southern Building or any opinion that a fall of that height would be required. He repeatedly bolstered his doctors' credibility by saying, again without evidentiary foundation, that they were uncompensated. For example, the prosecutor urged:

> Now that is the testimony of the paid, compensated doctors they go all over the country to get, as compared with testimony of the uncompensated doctors of the State of Kentucky. You will, I am sure, properly evaluate that testimony. (616, 24a)

Then, to counter petitioner's suggestion during his testimony that pretrial discovery of certain Commonwealth evidence had been delayed, the prosecutor argued and mistated facts beyond the record. (617, 24a-25a)

[4] Other assertions by the prosecutor contributed to his suggestion that the out-of-state doctors were deliberately deceiving the jury. Referring to Dr. Helpern's review of the pictures at the professional meeting, the prosecutor said, "before the dough showed he said it was a death by violence." (615, 23a) Again, referring to the pictures, the prosecutor said:

> Now let's get to the evidence that don't make mistakes. These photographs and all the others, these photographs cannot be influenced by game or by money or by position in life or any other motive or thing cannot change or influence a photograph. That sometimes happens with other types of testimony. (618, 25a)

across the courtroom in a reenactment of the crime which was unsupported by the evidence. Throughout the trial the defense had sought to meet and explain any suggestion that the bathroom reflected the scene of a struggle rather than of an accident. Accordingly, the defense stressed that none of Mrs. Moore's clothing was torn, no buttons ripped and although she had tissue under her fingernails, petitioner bore no scratches nor any other sign of struggle. (587) When one of the FBI agents testified that hair similar to Mrs. Moore's was found on the stool and examination of the roots indicated it had been forcibly extracted, (345-48) defense counsel quite properly brought out on cross-examination that combing hair forcibly extracts it by the roots. (350-353) Since the agent did not testify he found any significant concentration of hair and since the stool was used for a woman's vanity, the cross-examination on hair combing was extremely pertinent. In response to that line of questioning, the prosecutor suggested in his summation that the stool was the murder weapon although the expert testimony appeared to contradict that suggestion. Then while flinging the chair across the room he urged, "You don't comb your hair with this." (619, 26a) The exact effect on the jury as the stool crashed around the courtroom can only be surmised, but the prosecutor's conduct was calculated to arouse passion over reason.

The improprieties in this argument were not "minor abberations" in an otherwise proper summation. See *United States* v. *Socony-Vacuum Oil Co., supra* at 240. Nor were the improprieties provoked by a like attack on the part of the defense. And finally, the trial court

took no curative action to discredit the prosecutor's approach. The judge did sustain objections to certain arguments which were beyond the evidence (612, 21a; 617, 25a) and mildly chastized the prosecutor for the stool-throwing incident. (619, 26a). But the court issued no cautionary instructions evidencing a rejection of the prosecution's approach and denied the vast majority of the petitioner's objections.

On the rare occasion that the trial court sustained an objection the prosecutor excused his excesses by expressing his personal opinion as to the petitioner's guilt. He stated:

> "And at this point gentlemen, may I apologize if I seem to get too excited. It is only because of my sincere belief, my unquestioned belief based solely on the evidence that you've heard that this is a willful murder case." (612, 21a)

And again, in arguing for the imposition of the death penalty for wilfull murder, the prosecutor asserted:

> You were told in the opening statement—I knew the facts of this case, of course, and I haven't slept I'll tell you in the last week, and I prayed to my God that I would have persuasive power to see that a jury did justice in this case, justice that I know should be done, and I'm speaking to you now from what has been presented from the witness stand, of course, but I did pray to my God, and I haven't slept from the fear that I might overlook something that would prevent justice from being done. (621, 27a)

Permitting this argument, the lower court follows one branch of a conflict between state decisions and between federal courts of appeal as to the effect of an expres-

sion of personal opinion as to guilt coupled with a reference indicating that the opinion is based on the evidence. See Annot., 50 A.L.R.2d 766 (1956). Some courts have indicated that the expression of individual belief is permissible so long as the belief "is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief." *Henderson* v. *United States,* 218 F.2d 14, 19 (6th Cir. 1955); accord, *Thompson* v. *United States,* 272 F.2d 919 (5th Cir. 1959); *Schmidt* v. *United States,* 237 F.2d 542, 543 (8th Cir. 1956). Other circuits adhere to the absolute proscription against personal opinions contained in the Canons of Ethics, "not only because counsel would then in effect be a witness not under oath or subject to cross-examination but because the false issue of credibility of counsel, with government having the advantage, would be injected." *Patriarca* v. *United States,* 402 F.2d 314, 321 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969); accord, *United States* v. *Cotter,* 425 F.2d 450 (1st Cir. 1970); *Harris* v. *United States,* 131 U.S.App.D.C. 105, 402 F.2d 656 (1968).

This Court should grant this petition to resolve this conflict affecting a vital step in the criminal justice system. Closing argument provides any advocate a most persuasive forum. The prosecutor in a criminal case has the added advantage of being the representative of all the people and often, as here, speaks to the jury last. The success of the guilt-determining process not only does not need but cannot withstand a prosecutor's expressions of personal belief in the guilt of the accused. Such expressions constitute unsworn testimony which, if offered in court, would be inadmissible. The additional assertion that the belief is

based upon the record affords no guarantee that the jury will not conclude the prosecutor possesses special knowledge due to his unique position, especially where as here he asserts: "I've never seen anything like it in the some 25 years I've been prosecuting these cases. (622, 27a)

The prosecutor's argument was contrary to applicable decisions of this Court. It violated virtually every proscription in the standards recommended by the American Bar Association's Project on Criminal Justice. See American Bar Association, *Project on Standards for Criminal Justice, The Prosecution Function,* § 5.8, and commentary (Approved Draft 1971). Counsel's intentional misstatement of the evidence and expressions of personal belief are expressly forbidden by the Canons of Ethics. See American Bar Association Canons of Professional Ethics Nos. 15 and 22 (1968); American Bar Association Code DR. 7-106(C) (4). Yet the court below affirmed the conviction virtually endorsing the summation. Too many courts, when confronted with summation violations, have either failed to reverse without comment or failed to reverse with a slap on the wrist to the prosecutor involved. Judge Jerome Frank criticized this approach:

> Such an attitude of helpless piety is, I think, undesirable. . . . If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. . . . The depracatory words we use in our opinions on such occasions are purely ceremonial. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.) (dissent), cert. denied 329 U.S. 742 (1946).

This Court should take the opportunity afforded by this petition to reaffirm the salutary principles of *Berger* v. *United States* and make clear that all prose-

cutors in both state and federal courts must adhere to basic standards of fairness and decorum or suffer the meaningful sanction of appellate reversal.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH

FIRST DIVISION

No. 143639

COMMONWEALTH OF KENTUCKY, *Plaintiff*

v.

WILLIAM BANTON MOORE, *Defendant*

Opinion of Court on Motion for a New Trial

Defendant's motion for a new trial alleges 28 grounds why the verdict of the jury finding him guilty of voluntary manslaughter in the killing of his wife and fixing his punishment at confinement of 21 years in the penitentiary should be set aside. Many of the grounds are duplicitous. After hearing oral arguments by counsel for defendant and the Commonwealth and after reading the numerous authorities submitted, the court considers only two of the 28 grounds sufficiently meritorious to require extended comment.

Defendant insists there was insufficient evidence submitted to prove the corpus delicti and therefore he was entitled to a directed verdict of acquital. In support of this contention he cites *Hollin, et al* v. *Commonwealth,* (Ky.) 307 S.W. (2d) 910; *Ratliff* v. *Commonwealth,* (Ky.) 406 S.W.(2d) 728; *Witt, et al* v. *Commonwealth,* 305 Ky. 31, 202 S.W.(2d) 612; *Hendrickson* v. *Commonwealth,* (Ky.) 235 S.W.(2d) 981; *Alexander* v. *Commonwealth* (Ky.) 277 S.W.(2d) 17 and several other cases of like import.

In Hendrickson and Alexander there was a total lack of evidence to prove a crime had been committed. Hollin and Ratliff the only evidence connecting defendants with the killings was that defendants were with the victims

some hours prior to the finding of their bodies. Such cases are plainly distinguishable on their face from the case at bar.

In *Witt et al* v. *Commonwealth*, supra, all concerned were involved in a drinking bout. The question was whether the deceased died as a result of blows inflicted in a fight or from other causes. The opinion of the court states a doctor testified:

> "There was no break in the skin, no blood issuing from any of the wounds, and there was no other marks indicating violence on the body. The doctor stated that it was possible for death to have been caused by blows producing the wounds he described. There was evidence that the deceased was afflicted with a heart ailment, and the doctor stated that death could have been produced by over-indulgence in alcohol; he testified that he could not determine which, if either, of the probabilities caused the death."

The opinion further stated:

> "There was no evidence of a fracture, and the testimony of the embalmer indicates that there was no rupture or leakage in the vascular system when the body was embalmed. No post mortem operation was performed, and the only doctor to testify frankly stated that he did not know the cause of death, as he could not determine from his findings whether death was caused by over-indulgence in alcohol and its effect upon a weakened heart or by a blow to the head and its possible effect upon the deceased."

The Court held medical testimony is not always necessary to prove cause of death, but it may be shown by circumstantial evidence and concluded:

> "None of the blows to Portman's face was delivered with sufficient force to break the skin; the tear to the

eye was a mere surface wound; it did not penetrate the brain; and there was no evidence of a fracture or internal hemorrhage .... *By clear and cogent evidence we do not mean that the evidence must be without contradiction, or such as to command belief; but it must present more than a mere possibility of the existence of the fact or the happening of the act which the jury is called on to determine.* Fractures of the skull often produce death, and such is common knowledge; but mere superficial bruises .... seldom, if ever, produce death and this also is common knowledge."

In *Commonwealth* v. *Sullivan*, 285 Ky. 477, 148 S.W.(2d) 342, the left side of the victim's skull was crushed and bone of the skull was pressing on his brain as a result of being struck by defendant with a rock. A doctor testified he was unable to say what caused the death of the victim. The Court affirmed a verdict of guilt saying:

> "Without any medical testimony, the evidence was sufficient to take the case to the jury on the issue as to whether or not his death was caused by the wounds inflicted by appellee .... There are many cases where the facts proved are such that any laymen of average intelligence would know from his own knowledge and experience that the injuries were the cause of death .... A mere possibility that death resulted from some cause other than the act of accused will not overcome facts proved leaving no rational grounds for doubt citing cases)."

One of the foremost authorities on criminal law is Professor Rollin M. Perkins. In his recent text book, Perkins on Criminal Law, p. 106, he states *"the corpus delicti of murder is homicide."* Long ago Wigmore reached the same conclusion. Wigmore on Evidence, Vol. 7, Sec. 2073. Roberson's New Kentucky Criminal Law & Procedure is in ac-

cord, Secs. 282 and 423. All case law, Kentucky and foreign, is that the corpus delicti consists of two elements; the existence of a certain act or result forming the basis of the criminal charge, and existence of criminal agency as having caused it. Kentucky cases are collected in 10A Kentucky Digest, Homicide, Key #228.

If, therefore, the evidence taken as a whole in the case at bar leaves no reasonable doubt that a homicide was committed, the corpus delicti was proven. In other words, if there was sufficient evidence to submit the case to the jury the corpus delicti rule is met. That there was sufficient evidence is beyond doubt. Two medical experts for the Commonwealth stated that the criminal agency was blows to the head of the deceased. Two medical experts for the defense stated otherwise but admitting the possibility of the criminal agency. Regardless of the testimony of the medical experts, the jury was amply justified from the photographs and all other evidence introduced, including the testimony of defendant, in concluding beyond any reasonable doubt that the criminal agency was blows to the head of the deceased. While defendant denied killing his wife, he repeatedly admitted to investigating officers that if she was killed he did it. The Court is convinced all elements of the crime of homicide were proven and therefore there is no merit in the contention that the corpus delicti was not proven by the Commonwealth.

Defendant vigorously claims the court erred in admitting numerous color photographs in evidence, several of which were enlarged. The contention is that they were gruesome and prejudiced the jury against defendant. Numerous cases are cited holding that gruesome photographs serving no useful purpose are inadmissible in evidence. The Court has no quarrel and agrees with that established rule, but it is wholly inapplicable and does not govern the case at bar.

Color photographs are admissible under the same circumstances as black and white photographs. 22 C.J.S. Sec. 852

(1), p. 360; 48 Journal of Criminal Law, etc. 321; Annotation, 50 AL.R.(2) 1102; *People* v. *Stoudt,* (Ill.) 232 N.E.(2) 800 (1968). In *People* v. *Brawley* (Cal.) 461 P.(2) 361 (1969), a murder case with a sentence of death, the court said: "The color photographs were used by the autopsy surgeon to point out to the jury the numerous lacerations on the body. In addition to illustrating and clarifying the autopsy surgeon's testimony, the pictures constitute circumstantial evidence of malice (citing cases)."

Enlarged photographs are admissible and proper. *Puckett* v. *Commonwealth,* (Ky.) 255 S.W. 125; *U.S.* v. *Nolan,* 316 Fed.(2) 588; *U.S.* v. *Parhms,* 424 Fed.(2) 152, cert. denied.

In the opening statement by counsel for defendant the jury was told that the victim met her death by reason of a fall or falls in the bathroom of their home. The defense was that the victim died as a result of an accidential fall or repeated falls due to her consumption of alcohol beverages. To refute the contention that the victim's death was accidential and to show it was brought about by a criminal agency, the photographs were clearly admissible regardless of their gruesomeness. All the cases and text authorities so hold.

In *Jaggers* v. *Commonwealth,* 439 S.W.(2d) 580 (1969) the contention was that the photographs were extremely gory, showing blood and gore everywhere. In affirming a death verdict for murder the court said:

> "As noted in Salisbury v. Commonwealth, 417 S.W. (2d) 244, the rule prohibiting inflamatory evidence does not preclude the disclosure of the basic facts surrounding the commission of a crime when these facts are relevant to the issues on trial. *Clearly, the Commonwealth was on its proof to demonstrate that the decedent had been beaten to death by the defendant. The evidence complained of tended to prove that charge.*"

In *Salisbury* v. *Commonwealth,* 417 S.W.(2d) 244, a murder charge and a death sentence, as to the gruesome photographs introduced, the court said:

> "The photographs were competent, as a part of the res gestae. The rule prohibiting the exhibition of inflammatory evidence to a jury does not preclude the revelation of the true facts surrounding the commission of a crime when these facts are relevant and necessary. *When the rule otherwise, the state would be precluded from proving the commission of a crime that is by nature heinous and replusive.* If evidence is otherwise competent, the fact that it is heinous or replusive will not make it incompetent. Where the photographs revealed nothing more than the scene of the crime and the persons of the victims, they were not incompetent, *Smith* v. *Commonwealth,* Ky. 402 S.W. (2d) 686, *Howard* v. *Commonwealth,* Ky., 395 S.W. (2d) 355.

In *Hollin,* et al v. *Commonwealth,* 307 S.W.(2d) 910, the same defense as in the case at bar was interposed. In holding the photographs admissible the Court said:

> ". . . . . the Court correctly ruled that the photographs of Humfleet's body were admissible. We reach this conclusion because the photographs tend to show that Humfleet's death was not accidential, but that his death was due to a malicious and heinous attack upon his person."

Other cases holding gruesome photographs admissible when necessary to prove a homicide are: *Johnson* v. *Commonwealth,* 445 S.W.(2d) 704; *Napier* v. *Commonwealth,* 426 S.W.(2d) 121, an able opinion by Judge Palmore; *Smith* v. *Commonwealth,* 402 S.W.(2d) 686.

In *State* v. *Johnson,* (N.M.), 263 Pac.(2d) 282, photographs "exposing fractures of the skull and certain fleshy parts of the head and shoulders of the deceased" similar to

the photographs in the case at bar, were admitted in evidence. Text authorities are in accord with the Kentucky cases. Wigmore on Evidence, Vol. 4, Sec. 1157; 23 C.J.S., Criminal Law, Sec. 852(1). The cases are collected in an annotation, 73 A.L.R.(2) 768. In view of the above authorities the contention that the photographs were inadmissible lacks merit.

Ground #8 says error was committed in admitting into evidence various items of property removed by the police-detectives from the bathroom of the home of defendant and the victim when they were called to the scene of the homicide. No question of search is presented. There was no search at the time as none was necessary. Evidence of a crime was seized. The police-detectives would have been derelict if they had not done so. It is settled that no arrest or warrant is necessary prior to taking possession of evidence found at the scene of a crime. *Johnson* v. *Commonwealth* (Ky.) 443 S.W.(2d) 20; *Irvin* v. *Commonwealth*, (Ky.) 446 S.W.(2d) 570.

Ground #12 apparently attempts to say that the court excluded jurors in violation of *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, even though the defendant on trial was not found guilty of wilful murder. Be that as it may, the court strictly complied with the rule announced in Witherspoon as the transcript of the voir dire examination clearly shows.

Several grounds complain, in general terms, of the instructions given by the court and of the refusal of the court to give tendered instructions. The court instructed on murder, manslaughter and two degrees of involuntary manslaughter. A specific instruction on accidental death was refused. This was proper. The last of the many cases so holding is *Dolan* v. *Commonwealth*, decided June 4, 1971 by the Court of Appeals.

Ground #23 complains of error in permitting the jury to view the scene of the crime after all evidence was com-

pleted. The jury made the request to view the scene. A complete answer to this contention is that counsel for defendant and the Commonwealth expressly agreed and consented that the jury go to the scene. The record so reflects. Further the governing statute, KRS 29.66, was strictly complied with. The court accompanied the jury, as required, and made certain jurors asked no questions or discussed the case at the scene. In addition, this contention is squarely laid to rest by *Barnett* v. *Commonwealth*, (Ky.) 403 S.W.(2d) 40.

Ground #24 contends the court erred in permitting the jury to deliberate from 1:30 p.m., Friday, June 11, to approximately 5:30 a.m., Saturday, June 12, without sleep. For reasons hereinafter stated this contention borders on the frivolous.

No contention is made or could be made as to a "Allen charge" as the court at no time or in any manner communicated with the jury except at their written request. Arguments of counsel were completed shortly after noon on Friday, June 11. The jury went to lunch and returned at 1:30 p.m. Some five hours later the jury delivered to the court a written request, filed in the record, to be taken to dinner. They returned from dinner approximately an hour later and resumed their deliberations. Later the jury requested and received coffee. The court informed the jury in open court to advise the court, after returning to the jury room, if they desired to continue their deliberations or if they desired to retire for the night. The jury immediately notified the court in writing, filed in the record, that they wished to continue their deliberations. They did so until approximately 5:00 a.m. when the jury notified the court in writing, filed in the record, their desire to retire for the night to a hotel. They informed the court they would return at 2:00 p.m. on Saturday, some eight hours later, to continue their deliberations. The jury returned at 2:00 p.m. on Saturday and three to four hours later reached a verdict.

Thus, every shot was called by the jury without an iota of interference or suggestion from the court. In the matter of length of deliberation, of meals and sleep, the jury controls the court, not the court the jury. *Tarrence* v. *Commonwealth*, (Ky.) 265 S.W.(2d) 40. This ground is wholly without merit.

Ground #22, containing numerous sub-grounds, alleges the prosecutor made inflamatory remarks to the jury in his closing argument. Among other things, it is said he testified to the reputation of the two medical experts for the Commonwealth; that it was prejudicial for him to infer that the medical experts for the defense were attempting to pull the wool over the eyes of a dumb Kentucky jury; that he deduced unjustified inferences from the evidence, etc.

The prosecutor in his summation strongly urged the jury to inflict capital punishment for the offense of wilful murder. The jury was not persuaded or influenced by the argument, as it found defendant guilty of voluntary manslaughter, indicating the prosecutor's argument was anything but inflamatory. It is true the prosecutor's language would perhaps be out of place at a church meeting, but it was appropriate in urging maximum punishment for the offense of wilful murder under the evidence before the jury.

In *Lewis* v. *Commonwealth*, 307 Ky. 733, 212 S.W.(2d) 269, the court said:

> "In the case of Housman v. Commonwealth, 128 Ky. 818, 110 S.W. 236, 239, the rights and limitations imposed upon prosecuting counsel in his argument to the jury are thus defined: 'Much latitude is of necessity allowed an attorney in the presentation of his case; the only limitations being such as require him to confine himself to the facts introduced in evidence, and the fair and reasonable deductions and conclusions to be drawn therefrom, and the application of the law, as given by the court, to the facts proven. Controlled, regulated,

and bounded alone by these limitations an advocate may, with perfect propriety, appeal to the jury with all the power, force, and persuasiveness which his learning, skill, and experience enable him to command, and of this character of argument the accused may not complain, even though he feels that his conviction may be traceable more directly to the argument of counsel than to the facts proven.' That definition has never, so far as we have been able to ascertain, been criticized or in any manner limited by any opinion of this court since that date. On the contrary it has been followed in numerous cases."

The court did not allow either counsel to testify in their summations. Arguments, characterizations and inferences reasonably based on the evidence is perfectly proper argument. *Hall* v. *Commonwealth*, 242 Ky. 717, 47 S.W.(2d) 538. Such does not constitute testifying.

The argument by the prosecutor to the effect that medical experts for the Commonwealth inspired confidence and reflected on the witness stand honesty, truthfulness and sincerity, was proper argument. *Parson* v. *Commonwealth*, (Ky.) 112 S.W. 617. So also was the argument to the effect that the medical experts for the defense were attempting to pull the wool over the eyes of a Kentucky jury. In *McGee* v. *Commonwealth*, (Ky.) 395 S.W.(2d) 378, the prosecutor said: "They come in here with a cock and bull story that it was an accident and expect the jury to let him off." The Court held such was proper argument. A statement by the prosecutor that defendant "fixed up his defense" was held proper argument in *Phillips* v. *Commonwealth*, 227 Ky. 212, 12 S.W.(2d) 305. "Because you are country people, he thinks he can ram such as that down your throat" was held improper in *Thompkins* v. *Commonwealth*, (Ky.) 90 S.W. 221. And the prosecutor had the right to "comment on the interest (also their bias) of the witnesses for the

efense as affecting their credibility." *Jump* v. *Commonealth*, (Ky.) 444 S.W.(2d) 723. The contention the proecutor erred when he asked the jury, in effect, what they ere going to tell the good people of the community is witht merit. *Stanfill* v. *Commonwealth*, 209 Ky. 10, 272 S.W. ; *McGee* v. *Commonwealth*, (Ky.) 395 S.W.(2d) 378; *Johnon* v. *Commonwealth*, (Ky.) 302 S.W.(2d) 585.

All statements of the prosecutor were arguments, haracterizations of inferences fairly based on the evidence efore the jury. None, in the opinion of the court, were rroneous much less prejudical. The court finds Ground 22 without merit.

The several other grounds advanced for a new trial have ll been considered and found lacking in substantial merit.

The defendant charged with wilful murder, was conicted of voluntary manslaughter. The evidence amply susains the verdict of the jury. He was represented by able ounsel and the court, as was its duty, gave defendant the enefit of every doubt. He had a fair trial, free of errorrejudicial or otherwise. The motion for a new trial is lenied.

This opinion is ordered filed and made part of the record.

S. Rush Nicholson
Judge

July 13, 1971

Mr. Frank Haddad, Jr., Attorney
for Defendant.

Mr. Carl C. Ousley, Jr., Attorney
for the Commonwealth.

Rendered: November 17, 1972

COURT OF APPEALS OF KENTUCKY

WILLIAM BANTON MOORE, *Appellant*

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HON. S. RUSH NICHOLSON, JUDGE
COMMONWEALTH OF KENTUCKY, *Appellee*

Opinion of the Court by Justice Osborne

AFFIRMING

Appellant was convicted of voluntary manslaughter and sentenced to 21 years' imprisonment for the slaying of his wife, Louisa Moore. The facts of the case are as follows:

Appellant, an architect, resided with his wife and two children at 3 Woodhill Road in Prospect, Kentucky. On December 4, 1970, Louisa had been visiting in New York City. Sometime in the late afternoon or early evening she flew home from New York and disembarked at Standiford Field. Appellant met her there. They went to a restaurant in Louisville where they had dinner, accompanied by two or three drinks.[1] After dinner they went to their home. According to appellant they arrived there between eight and nine o'clock. They went straight upstairs to their bedroom where Mrs. Moore turned on the television and they talked for a short period of time. Mrs. Moore mentioned that she wanted a divorce. According to appellant's testimony he advised her it was impossible, that they had too many responsibilities. He further testified that at this point he felt the conversation might become argumentative so he suggested that he go sleep in another room and left. He testified that he went down-

[1] Appellant testified his wife had been drinking when she arrived.

stairs and turned on a television there, sat down and watched it for a minute or two until there was an intermission, went outside and picked up the suitcases and brought them to the bedroom; that it was probably around ten o'clock when he took the suitcases upstairs, and that he did not see his wife when he entered the bedroom. He assumed she was in the bathroom.

Following this he went back downstairs to the den where he read the newspapers and watched television until about midnight. When he went back to the bedroom, his wife was not there. The suitcases were unopened. He then looked into the bathroom and found her lying on the floor. He testified that she was lying pretty much on her back with her face turned slightly away from the door. He felt for her pulse, then took a hand mirror from a vanity table to see if she was breathing. No moisture was formed on the mirror, whereupon he proceeded to give her artificial respiration. Following this he attempted mouth-to-mouth resuscitation. After he determined that he could not revive her he called Dr. Burford Davis. Dr. Davis arrived shortly thereafter and advised him that she was dead. Upon receiving this information he called the police. Appellant testified that he was not sure whether he called the police or Dr. Davis made the call. Upon their arrival, appellant advised the police that no other person could have entered the house and if his wife were killed, he would have to be the one who did it, but that in his opinion she died as the result of a fall in the bathroom.

The Commonwealth introduced into evidence testimony of police officers who arrived upon the scene along with personnel from the coroner's office describing the condition in the bathroom at the time they arrived. Photographs of the interior of the bathroom were introduced into evidence. The deceased was shown on the floor of the bathroom in a virtual sea of blood. Blood, hair and tissue were scattered over the entire interior surface of the bathroom on

the floor, walls and ceiling. The entire scalp on the back half of the deceased's head was torn loose and hanging open and her skull was fractured. In addition, she had small bruises and abrasions on her arms, shoulders and on her neck.

Dr. Lawrence H. Boram, a resident pathologist at Louisville General Hospital, performed the autopsy on the body. The substance of his testimony is that in his opinion the deceased died as the result of multiple blows by some relatively blunt object, and that the wounds found on her body could not have been caused by a fall.

Dr. Allen Lansing also testified that in his opinion the injury was caused by multiple blows to the head by a very hard object and that the injury could not have resulted from a fall. The appellant offered evidence by expert pathologists that contradicted the testimony of Dr. Boram and Dr. Lansing.

Appellant first contends that there was insufficient evidence of corpus delecti to submit the case to the jury. We disagree. The testimony of Dr. Lansing and Boram coupled with the photographs in the case, in our opinion, were sufficient beyond any doubt to convince the unbiased observer that the deceased met her death as the result of violence from some other source than a fall. Since appellant admitted that no person other than himself could have inflicted the injuries, we believe this was sufficient to establish corpus delicti.

Appellant's second contention is that the trial court committed prejudicial error in allowing the colored photographs and blood-stained clothing to be introduced into evidence. We have examined the evidence carefully and believe they were properly admitted. We stated in Salisbury v. Commonwealth, Ky., 417 S.W. 2d 244 (1967), that where the facts revealed by photographic evidence are competent and necessary, the evidence cannot be excluded

ecause it is heinous or repulsive. We there pointed out hat were the rule otherwise, the state might be precluded rom proving the commission of a crime that by its nature as heinous or repulsive. We believe the photographs in his instance were without question the best evidence of he scene of the interior of the bathroom where the body as found and that it was most relevant to prove the conitions surrounding the body at the scene. As stated in Napier v. Commonwealth, Ky., 426 S.W. 2d 121 (1968), the ime has come when it should be presumed that a person apable of serving as a juror in a murder case can, without losing his head, bear the sight of photographs showing he body of the decedent in the condition in which it is ound. Objection is made by appellant in this case that nlarged photographs of the interior of the bathroom were xhibited to the jury. While it is true that a view of these hotographs has some effect to shock, it is nevertheless true hat they did serve to give the jury better perspective and nderstanding of the scene in the bathroom as it existed. We believe their evidentiary value in this respect exceeded ny tendency they might have had to in any way inflame he passions of the jury. We believe the photographs were ll competent.

Appellant next contends that the trial court committed rejudicial error when it instructed the jury on voluntary nd involuntary manslaughter. As to this contention we ill first point out that there could be no prejudicial effect rom the instruction on involuntary manslaughter as appelant was not found guilty under this instruction. While here is doubt that appellant's objection in his motion and rounds for a new trial is sufficiently specific to properly aise the question of whether or not the instruction on voluntary manslaughter should have been given, we will, evertheless, pass upon this point as we are of the opinion he instruction was not prejudicial. The fact that the arties had been drinking and had been discussing the ossibilities of a divorce coupled with the physical sur-

roundings existing at the time the body was found, and the markings upon the body, in our opinion are sufficient to warrant the jury in believing that the homicide was accomplished as the result of heat of passion. Therefore, the instruction on voluntary manslaughter was justified by the evidence. We think the case falls within the rule that if a reasonable inference can be drawn from the evidence that the defendant in a homicide case is guilty of a lesser crime than murder then proper instructions should be given on such lesser crime. Pennington v. Commonwealth, Ky., 344 S.W. 2d 407 (1961); Harris v. Commonwealth, Ky., 389 S.W. 2d 907 (1965).

Appellant's next contention is that the court erred in permitting the Commonwealth to introduce Dr. Lawrence Boram as a rebuttal witness. We have examined the record and find that no proper objection was made to the admission of his testimony.

It is finally contended by the appellant that the trial court erred in not sustaining his motion to suppress evidence obtained from the home by reason of a defective search warrant and in permitting inflammatory arguments by the Commonwealth's Attorney at the close of the case. We find no merit in either of these contentions. It is our opinion the search warrant was valid and the closing arguments by the Commonwealth were within the bounds previously permitted by this court.

The judgment is affirmed.

All concur.

PETITION FOR REHEARING OVERRULED—Feb. 16, 1973

Mandate

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS

Fall Term—November 17, 1972

WILLIAM BANTON MOORE

vs:

COMMONWEALTH OF KENTUCKY

Appeal from a judgment of the
Criminal Branch—1st Division
Jefferson Circuit Court
CR-143639

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

FRANCES JONES MILLS
Frances Jones Mills, C.C.A.

By ....., D. C.

Issued Friday, February 16, 1973

Excerpts from Transcript of Proceedings

[606] By the Court: You may proceed, Mr. Ousley.

Closing Argument by Mr. Ousley: May it please the Court, Mr. Haddad and Gentlemen of the Jury, before I briefly comment on the evidence that has been presented to you in this case, I want to say this, please: you have a right to request that all testimony or any part of the testimony of any witness from that witness stand be reread to you. I say that because undoubtedly [607] in my summation there will be questions raised as to what some witness said, so you have a right now, and exercise that right if you deem it necessary to call for the entire or any part of the testimony of any witness who took that witness stand.

Before I briefly outline the evidence we have presented the only answer at this particular time do I want to make to the argument that you have just heard, and that's in regard to fingerprints. I want to point out the obvious, heads do not make fingerprints nor do throats retain impressions of fingers.

Now briefly, very briefly, here is what the Commonwealth of Kentucky has proven to you in this case. For a number of years, fifteen years to be exact, there were arguments about a divorce and two days before she returned from New York in a telephone conversation the victim Mrs. Moore said to the Defendant "I have decided on a divorce". And whenever she talked about divorce, quote "This always made me made", the end of the quotes.

So, on Friday, December the 4th he meets the plane at Standiford Field. They had dinner. They had three drinks, according to him, and before we go one point further on the question of drinking, of being drunk, I ought to stop right now and remind you what [608] the sworn testimony showed. He says she was not drunk. Her blood was

analyzed by a cnemist of the Kentucky State Police Crime Laboratory which showed a reading of .09, and under the law of Kentucky it takes a reading of one ten(sic) before you can't drive a car, so legally she was not drunk, and one of the jurors asked "Did she have any more to drink when she got home?" and he said "No". So let's get that straight right now, she was not drunk, and let me point this out to you, and may God be kind to her, when the daughter gets on the stand and tells you how drunk her mother has gotten for the past 15 years, that's why it's an accident she says. She said, and I do not in any way criticize her for this, she did not go into or look into that bathroom, she did not look at the pictures, but she says that because mother was drunk in the past she was drunk that night and it was an accident. I say, may God be kind to her, and for some reason she throws in that mother attempted to cut her wrist ten years ago. You will probably evaluate that testimony, I'm sure.

So, he meets the plane. They get home at 9:00 o'clock. Again talk about divorce. The police call was logged, get this please, the call to the police, a corpse, was logged at 12:30 A.M. It was made [609] by Dr. Davis, which means of course that Dr. Davis got there some little time before the calling of the police at 12:30, perhaps 10 or 15 minutes. And he pronounced her dead. You will remember that he told you that her skin was cool which meant in his medical opinion that she had been dead from one to one and a half hours in that bathroom. "In my medical opinion," says the good doctor, "from the coolness of the skin, she had been dead from an hour to an hour and a half". Remember the call to the police at 12:30. Dr. Davis got there I assume some 10 or 15 minutes prior to his saying "There's nothing I can do. It's not a doctor's case. Call the police". The police arrived some 12 minutes later. You heard the testimony of Officer Taylor, of Detective Davis, Deputy Coroner Anderson and Lieutenant Cook. They all told you what they saw there in the bathroom

and what they found. Numerous colored photographs that we have introduced here into evidence were immediately made before anything was touched or anything was disturbed in that bathroom. We'll go over them. They're all here. The officers told you of blood all over the place including the ceiling, the four walls, the ceiling. They told you of hair and flesh scattered about that bathroom, and I'll get to it, you won't have to rely on what the officers [610] told you. They told you of the flesh wounds on the throat, and I'll show that to you or you've seen it by photograph. They told you of the wadded towels and the wadded rugs, of her shoes, her shoes, with blood on the inside and outside, of the girdle and so forth. They told you of the wounds and bruises on her entire body, and get this, we'll get to it, everything, everything those police, those good officers told you is verified by uncontradicted photographs, unmistakable photographs for you to look at as you have and will again with your own eyes. We'll get to the photographs.

Dr. Lawrence Boram performed the autopsy for the State, worked over the body for however long the autopsy lasted, and he said, quote "The deceased received more than one blow to the head," end of quote. That, quote "Half of the scalp was torn from the skull bone, and in my opinion the described trauma was not caused by the victim falling," end of the quote. He described to you, and everything I am telling you, again is verified by unmistakable pictures before you. He described the recent bruises, the recent abrasions on the right arm, they're in the picture, on the left arm, on the picture, on the neck, over the temple, the shoulder area and her back. And the only thing not shown or possibly not shown by the photographs are the [611] ones on the back that he described to you. Dr. Allen Lansing who you can look at and say there's a man sincere, doesn't stretch his testimony, he's the Chief of Cardiovascular Surgery at the University of Louisville Medical School—he examined the pictures

some, not 2 days or 2 hours previous to taking the stand, but as he told you, some 4 to 6 weeks previous.

MR. HADDAD: If Your Honor please, I want to object to that. The statement wasn't that he studied them for that long but that he had them for that long.

BY THE COURT: The jury can recall the testimony.

MR. OUSLEY: Dr. Lansing told you that the head injury was caused by multiple blows, b-l-o-w-s, to the head by something quote "extremely hard and firm and blunt", the end of the quotes. And Dr. Lansing said, quote "I think the injuries described were too extensive to suggest a single blow or a fall". A single blow with an object would not separate this large an area, this large an area I repeat, of the scalp. Dr. Boram and Dr. Lansing both said repeated force was used to cause the fracture of the skull and the wounds about the body. They were not caused by falls says those two uncompensated doctors, and I'll get to that. Dr. Boram, under adroit cross examination, [612] said, and of course it's true, there is a possibility that such a fracture could be caused by a fall. Why certainly a possibility, a possibility under proper conditions, such a fall from the Inter-Southern Building from the 10th floor, that could cause it, that's a possibility.

MR. HADDAD: I object to his misquoting the evidence, Your Honor.

BY THE COURT: There is nothing in evidence pertaining to that. I don't recall anything about the Inter-Southern Building or any other building.

MR. OUSLEY: And at this point, Gentlemen, may I apologize if I seem to get too excited. It is only because of my sincere belief, my unquestioned belief based solely on the evidence that you've heard that this is a willful murder case.

At this point let's compare the medical opinions of Dr. Boram and Dr. Lansing with that of the paid opinions

of Dr. Helpern, the New York doctor, and Dr. Wecht, the Pittsburgh doctor. We'll muddy the water with a dumb Kentucky jury. We'll come in with a smart lawyer from New York—

MR. HADDAD: I object, if Your Honor please, to Mr. Ousley inferring in any wise that anyone [613] thinks this jury is a dumb Kentucky jury. I resent that remark and I ask your Honor to admonish the jury.

BY THE COURT: You may proceed, Mr. Ousley. This is argument.

MR. OUSLEY: Thank you, Your Honor. We'll pull the wool over the eyes of the jury down there in the hills of Kentucky. Unable to get a doctor here, the brother of the Defendant on trial, a New York lawyer who sits within the sound of my voice, got Dr. Helpern.

MR. HADDAD: We object to that, if Your Honor please. That is not true and there is no evidence to that effect.

BY THE COURT: The jury will recall the evidence about the relationship between the doctor and the brother. They can call for it to be re-read. You may proceed.

MR. OUSLEY: So they come up with Dr. Helpern a New York doctor, who all of his life has worked for the city of New York, and Dr. Helpern told you that he saw some of these pictures ten days before he testified here the other day and he saw five, get this, he saw five of the pictures in His Honor's Chambers, five of them, oh, some two or three minutes before he marched [614] out here to the witness stand. He did not see, he did not attempt to get the facts from Dr. Boram who performed the autopsy, the pathologist. No, I won't talk to him. He did not see fit to talk to Dr. Lansing of the University of Louisville Medical School. So he comes, flown in, from New York, and I say to you Gentlemen, with all sincerity he affronts your intelligence and mine in what he said to you. With the pictures before you showing worse than a slaughter house killing, he tells

you she died from a fall. Is it any wonder that I say "Well, we'll fool the boys who sit in judgment in Kentucky". With those pictures before you, he would say to you "That's a fall". So, the doctor, the compensated doctor comes from New York, and he did under cross examination admit reluctantly, quote "It could have been caused by a criminal agency", the end of quotes. That's not all. Get this, and I say to Your Honor, I wonder what's going on in this courtroom today or during this trial, get this, Dr. Helpern told you that he saw these pictures for the first time some ten days ago prior to the date that he took the stand, and on April the 26th, five or six weeks ago the fraternity, the pathologists fraternity invited the doctor, and Dr. Boram invited him, to come to their fraternity meeting and talk to them and he came and [615] attended the meeting at the General Hospital. Dr. Boram was there with these very photographs six weeks ago, the photographs which he told you from the stand showed a fall, when six weeks ago from the same photographs projected on a screen, blown up, before his employment in this case, before the dough showed, he said it was a death by violence. So I repeat, what's going on in this courtroom? The Pittsburgh employed doctor that, according to the defense, everyone recognizes as great as an expert in the field—everyone but the Commonwealth of Kentucky, I'll tell you that, if everyone does. So, he's flown in from Pittsburgh by a commercial jet, flown out of here by a chartered plane, the political, elected coroner now, of Allegheny County, Pennsylvania, who got the pictures on June the 8th at 2:00 P.M., one day before he took that stand, who praised Dr. Helpern to the high heavens, this compensated doctor who said he was getting $250 plus his traveling expenses, chartered planes and what not, came in here and said to you there was one major fall and additional falls, additional falls he would have you believe, additional falls after apparently a major fall, and the additional fall was in the exact spot, he would have you believe, of the major falls. And when I asked the good doctor "Are you

telling this jury that her body bounced around [616] like a rubber ball or a yo-yo?" he bristled up and said "I don't think those are very nice words," and I don't either but there's no answer to it. In my opinion, he insults your intelligence and my intelligence by making such a statement. Finally again, like his cohort Helpern, he said that the injuries could be caused by a blow but, in his opinion, that was unlikely. Now, that is the testimony of the paid, compensated doctors they go all over the country to get, as compared with testimony of the uncompensated doctors of the State of Kentucky. You will, I'm sure, properly evaluate that testimony.

You heard the defendant on trial on the stand. He told you, you saw it, you saw his demeanor. You know on some of these things the best polygraph, the best lie detector in the world is watching a man on the witness stand. You watched him. You saw his demeanor. You heard his answers to the questions. He told you that with his wife dying or dead in the bathroom, he took his shoes off to go out to the phone, I suppose. In any event, he said he took his shoes off so as not to get blood on the carpet, with his wife in the bathroom, and after he used the phone or whatever he did, he comes back in and steps into his shoes. I think some juror asked him about that and I think his reply was "Well, I'm a meticulous person," or some such reply. [617] He told you how he wiped blood from his hands on the tie, as I understand it, before he called Dr. Davis. He told you that Lieutenant Cook and Detective Davis told him they didn't think that he did it, which was, of course, denied by them, in fact Detective Davis told him just the opposite, that he did do it. He told you how the Commonwealth had been so unfair to him in hiding evidence on him, when he and his counsel since the start of this case have had a right to and did procure every item of evidence that we have introduced, examined every item of evidence, every picture introduced, weeks and weeks and weeks ago.

MR. HADDAD: That's untrue, Your Honor, and it's not in evidence in this case, and I object to it.

BY THE COURT: It's not in evidence, Mr. Ousley. It's an argumental question and it's not in evidence.

MR. OUSLEY: May I proceed? (continuing) He was asked "Why didn't you cry for help?" as any normal—or any person under the circumstances would do, and his reply was "I take care of myself". He told you about going back upstairs close to midnight, and "That's when I saw her". And he told you, quote "I think I was taken back", and after collecting his thoughts, he [618] said, "I am sure I was". He was careful to tell you all of the things that he claimed he attempted to do, the mouth-to-mouth resuscitation, the normal resuscitation, the use of a mirror. He tells you all these things and yet I remind you that when Dr. Davis came over and the police called at 12:30, Dr. Davis got there before that, he tells you about all of these things yet Dr. Davis says her skin was cold and she had been dead from an hour to an hour and a half.

Now let's get to the evidence that don't make mistakes. These photographs and all the others, these photographs cannot be influenced by game or by money or by position in life or any other motive or thing cannot change or influence a photograph. That sometimes happens with other types of testimony.

MR. HADDAD: I object to that, if Your Honor please.

BY THE COURT: It's argumental. You may proceed.

MR. OUSLEY: Photographs do not slant what they reveal. They can't. Photographs can't banter with the truth. Photographs don't lie, and here they are. I told you in the Opening Statement that we would produce the murder weapon. There's one of them (indicating Exhibit No. 20 the stool). There's one of them, [619] and you'll take this to your jury room. And here is the other (indicating bath-

tub in photograph). Here's the one. He grabs her head. There's the marks on her throat. And bangs it and bangs it, and here it is with hair marks and flesh and everything else. There it is! Special Agent Robert Beams of the Federal Bureau of Investigation told you of finding Type O blood, her type on everything. Here it all is, everything in that bathroom. There it is, all before you. Of finding blood in her shoes, and get this please, outside and inside her shoes. Type O blood. He told you of tissue on his tie, on her dress, tissue from her fingernail scrapings. He told you of blood on the washed suit and other items in the basement. Special Agent Myron T. Scholberg of the Federal Bureau of Investigation told you of finding hair on her dress, finding hair on the stool, hair that had been forcibly removed, and able Mr. Haddad said "Well, she could have combed her hair". You don't comb your hair with this (Mr. Ousley throwing Exhibit No. 20 the stool) or with a bathtub.

By the Court: Mr. Ousley, refrain from throwing things in this courtroom from this point on.

Mr. Ousley: Excuse me, Your Honor, excuse me.

By the Court: All right, you will [620] refrain from it.

Mr. Ousley: Yes, sir. You don't comb your hair with a stool or a bathtub. The detectives told you how they found hair here and they found hair on the other murder weapon. You heard it all. On the vanity. You heard it all. It's all before you, not only by witnesses but conclusively by photographs. The evidence, Gentlemen, that we have brought you in these last three days can leave no doubt, much less a reasonable doubt. There can be no doubt in God's world about this man's guilt, and I'll get to that. And they parade up and down this aisle ten or fifteen character witnesses. Let me tell you, I don't blame the defense for doing that, but I remind you that Mr. Booth that killed President Lincoln could have marched character witness after character witness to the witness stand. So you will properly evaluate,

I am sure, the character witnesses, club members and friends. I say to you, based upon the evidence that has been presented to you, I hope with all the sincerity that I possess, there could be no doubt in God's world as to this man's guilt. These pictures speak far more eloquently than I can. They attest his guilt beyond any shadow of a doubt much less a reasonable doubt. I am not concerned about the question of guilt. I am concerned about the [621] question of punishment. The Court, in its Instructions 2, 3 and 4, which I do not agree with but which are binding on me as they are binding on you, has told you that if you believe in certain things the evidence—they're in the Instructions and you'll have no problem understanding them —that if you believe certain things, you, in your discretion can fix punishment from jail time up to 21 years in the penitentiary. I do not possibly see how you could believe those things that would authorize such punishment or would justify such punishment, but that, of course, is for you to determine, not me, in your good judgment. You were told in the Opening Statement—I knew the facts of this case, of course, and I haven't slept I'll tell you in the last week, and I prayed to my God that I would have persuasive power to see that a jury did justice in this case, justice that I know should be done, and I'm speaking to you now from what has been presented from the witness stand, of course, but I did pray to my God, and I haven't slept from the fear that I might overlook something that would prevent justice from being done. I told you in the Opening that from the facts it was the unpleasant duty of the Prosecution to insist on the maximum sentence provided by law. We have proven the facts justifying the maximum sentence. Justice, Gentlemen, does not [622] permit punishment to be imposed on the basis of community or social prominence. That won't do. I remind you, please, Mrs. Moore was 44 years of age, in the prime of life. She was deliberately and cruelly, oh so cruelly killed. I've never seen anything like it in the some 25 years I've been prosecuting these cases.

Judge, she did not have twelve good citizens of this community to pass judgment on her. She had no able lawyer to defend her. No able judge to see that her every right was protected before she was so brutally killed. That man was her jury. He was her judge. He was her executioner. I ask you, please, in the name of justice, in the name of everything that is fair and right, in the name of God, do your duty in this case, and may God be with you in your deliberations. I thank you.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

WILLIAM BANTON MOORE ..... PETITIONER

vs. No. 72-1546

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *William Banton Moore* v. *Commonwealth of Kentucky,* reported at 489 S.W.2d 516 (1972).

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the

jurisdictional requirements of 28 U.S.C. § 1257(3), the proper provision for review of a state court judgment in a criminal case on certiorari.

The question the petitioner attempts to present here under the Fourteenth Amendment of the Constitution of the United States has never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment on writ of certiorari.

In *Columbia Water Power Co.* v. *Columbia Electric R.L.& P. Co.*, 172 U.S. 475, 43 L.ed 521, 19 S.Ct. 247 (1898), this Court in discussing jurisdictional requirements stated:

> "There is no doubt that under the third class the Federal right, title, privilege, or immunity *must be*, with possibly some rare exceptions, *specifically set up or claimed* to give this court jurisdiction." (Emphasis added.)

Rule 23-1(f) of the rules of this Court provides in part:

> *"If review of the judgment of a state court is sought*, the statement of the case shall also specify *the stage in the proceedings in the court of first instance and in the appellate court*, at which, and *the manner in which*, the federal questions sought to be reviewed were raised; *the method of raising them* (e. g., by a pleading, by request to charge and exceptions, by assignment of error); *and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record*, or sum-

mary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) *as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.*" (Emphasis added.)

A review of the record of the state court proceedings in the instant case shows that petitioner did not specifically set up or raise a federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655, 41 L.ed 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rights rather than state rights. See *New York Central & Hudson River Railroad Co.* v. *New York*, 186 U.S. 269, 273, 46 L.ed 1158, 22 S.Ct. 916 (1901).

The fact that petitioner cited a United States Supreme Court case in his briefs to the state court is neither sufficient to raise a federal question nor sufficient to es-

tablish jurisdiction. Jurisdiction cannot be founded by surmise. *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934). This application for writ of certiorari should be denied, because petitioner failed to set out or raise a federal question with sufficient definiteness so as to bring such question to the attention of the state courts.

Even if petitioner could be said to have raised a federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock* v. *Memphis*, 20 Wall 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

As this Court stated in *Durley* v. *Mayo*, 351 U.S. 277, 100 L.ed 1178, 76 S.Ct. 806:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it."

The Kentucky Court of Appeals concluded, upon substantial state grounds, that the arguments of the Com-

monwealth Attorney were within the permissible limits allowed by state law.

Notwithstanding that petitioner had properly raised in the state courts the question he presents here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. Thus, determination of the question that petitioner brings here was unncesssary by the state court in its decision of this case.

For the foregoing reasons, respondent submits that petitioner's application for certiorari should be denied because it fails to meet jurisdictional requirements.

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, BASED ON KENTUCKY LAW, THAT THE CLOSING ARGUMENTS OF THE COMMONWEALTH'S ATTORNEY WERE NEITHER ERRONEOUS NOR PREJUDICIAL.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

THE COURT OF APPEALS OF KENTUCKY CORRECTLY DECIDED, BASED ON KENTUCKY LAW, THAT THE CLOSING ARGUMENTS OF THE COMMONWEALTH'S ATTORNEY WERE NEITHER ERRONEOUS NOR PREJUDICIAL.

The petitioner herein contends that the closing argument by the Commonwealth's Attorney was so inflammatory that it violated the applicable decisions of this Court. This incorrect assertion is primarily based upon the case of *Berger* v. *United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.ed 1314 (1935).

The Kentucky Court of Appeals, in reviewing the closing argument of the Commonwealth Attorney, concluded that:

> ". . . the closing arguments by the Commonwealth were within the bounds previously permitted by this court."

It is evident therefore that the Kentucky Court based its decision upon adequate state grounds. As was stated in *Lynch* v. *New York ex rel Pierson,* 293 U.S. 52, 54, 79 L.ed 191, 55 S.Ct. 16 (1934):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of the two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

The cases cited by petitioner are distinguishable by the fact that they are appeals from lower federal courts and as such would come under the inherent supervisory power of this Court to regulate proceedings therein under Article III, § 1 of the United States Constitution.

The petitioner claims that jurisdiction should be extended in this case due to the fact that there may be a conflict between the circuit courts of appeal and various state courts. It has been consistently held, however, that unless the procedure rises to the level of being a violation of the defendant's constitutional rights, then this Court has no inherent rule-making power over the state courts. As was stated in *Spencer* v. *Texas*, 385 U.S. 554, 17 L.ed2d 606, 87 S.Ct. 648 (1967):

> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to

our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' . . ."

The judgment below was affirmed upon the basis of existing state law which allowed considerable latitutude in the closing arguments of Commonwealth Attorneys. This argument was not so inflammatory that this Court can say that it violated petitioner's constitutional rights.

CONCLUSION

The petitioner has failed to properly meet the jurisdictional requirements or to present a substantial federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1972

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v.

COMMONWEALTH OF KENTUCKY, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Commonwealth of Kentucky asserts two grounds in its opposition to the petition for certiorari: that the petitioner failed to present and preserve a federal question in the state court and, alternatively, that the state court rested its decision on an independent and adequate non-federal ground. Given the basis for the petition, however, these are not properly alternative grounds. The federal question presented to this

Court is whether the improper closing argument of the Commonwealth's prosecutor violated petitioner's constitutional right to a fair trial. If properly preserved and meritorious, no independent or adequate state ground could exist to justify the affirmance of the conviction. See, *e.g., Ker* v. *California,* 374 U.S. 23, 33-34 (1963). Thus, the only pertinent issues are the merits of the contention and whether it was properly preserved.

Significantly, on the merits the opposition is practically silent. Except for the conclusory statement that "the argument was not so inflammatory that this Court can say it violated petitioner's constitutional rights," [1] no attempt is made to defend the numerous improprieties which permeated the summation. Because of the expressions of personal opinion, appeals to passion and factual statements without evidentiary support, the closing argument became unconfronted testimony which is constitutionally impermissible. See Carlson, *Argument to the Jury and the Constitutional Right of Confrontation,* 9 Crim. L. Bull. 293 (1973). The federal question raised by a grossly improper closing argument is before the Court in another petition, *Donnelly* v. *DeChristoforo,* No. 72-1570. There, the Commonwealth of Massachusetts seeks review of a First Circuit decision condemning as violative of due process prosecutorial summations which convey or even permit a false impression. *DeChristoforo* v. *Donnelly,* 473 F.2d 1236, 1240 (1st Cir. 1973) citing *Miller* v. *Pate,* 386 U.S. 1 (1967) and *Hamric* v. *Bailey,* 386 F.2d 390 (4th Cir. 1967).

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[1] Brief for Respondent in Opposition at 8.

By granting these petitions, this Court can address and resolve problems which often recur and strike at the heart of the truth-determining process of our adversary jury system. The issues are clearly defined and permit explicit guidelines for future federal and state trials without opening the floodgates to requests for this Court's hindsight judgment on every summation made by a federal or state prosecutor. Rules forbidding the expression of personal opinion,[2] an argument beyond the record[3] or blatant appeals to sectional prejudice[4] are capable of clear application and enforcement. They do not require a case by case analysis and counsel can easily tailor their conduct to the Court's proscriptions.

On the issue of preservation, the trial transcript reveals that petitioner's counsel exercised every possible effort to apprise the court of his objection and seek appropriate relief. Summation does present the most difficult stage of the trial to preserve a record. By tradition, counsel forbear objection and permit one another some latitude in the interests of an uninterrupted exposition of each side of the case. For the trial to be fair, however, each counsel must adhere to self-imposed standards of proper advocacy. The existence of this practice and the possibility of its abuse highlight the need for fixed guideposts from this Court.

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[2] See, *e.g.*, Patriarca v. United States, 402 F.2d 314, 321 (1st Cir. 1968), cert. denied, 393 U.S. 1022 (1969); Harris v. United States, 131 U.S.App.D.C. 105, 402 F.2d 656 (1968).

[3] See, *e.g.*, DeChristoforo v. Donnelly, 473 F.2d 1236 (1st Cir. 1973).

[4] See, *e.g.*, New York Central R.R. Co. v. Johnson, 279 U.S. 310 (1929).

When it became clear that the attorney for the Commonwealth was not going to discipline himself, petitioner's counsel repeatedly objected and articulated the basis for his objections as fully as possible given the limitations of the trial context.[5] Based on the improprieties in the argument, petitioner moved for a mistrial. The court denied the motion giving petitioner "a continuing objection to all of the Commonwealth's argument without the necessity of particularizing the parts objected to." (623-624)

As this Court has noted in a similar context, petitioner's objections were sufficient in that they were "ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action." *Douglas* v. *Alabama*, 380 U.S. 415, 433 (1965). Thereafter, on appeal to the Court of Appeals of Kentucky the issue was extensively briefed. Accordingly, the requirement of preservation of a federal question and the reasons supporting it have been met,[6] particularly since a full record on the issue was developed and the state courts, trial and appellate, were afforded the opportunity to pass on it.

The importance of the question presented has not been denied. Basically, the only claim has been the question was not preserved. The record answers that contention and the failure of the Commonwealth of

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[5] 611, 21a; 612, 21a; 613, 22a; 617, 25a; 618, 25a; 623-24. The record references are to the trial transcript and, where applicable, the corresponding page in the Appendix to the Petition.

[6] See, *e.g.*, Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Kentucky to meet petitioner's allegations on the merits further demonstrates the need for this Court's review.

Respectfully submitted,

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for a Writ of Certiorari entered on October 9, 1973[1] and (2) granting the Petition. As grounds for this Motion, petitioner states the following.

The Granting of Certiorari in Donnelly v. DeChristoforo, No. 72-1570.

On October 23, 1973, following the denial of certiorari in the instant case, this Court granted certiorari in *Donnelly* v. *DeChristoforo,* No. 72-1570,

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[1] Mr. Justice Douglas noted that he would have granted certiorari.

ruling below 473 F.2d 1236 (1st Cir. 1973) (hereinafter *DeChristoforo*). The question presented in *DeChristoforo* calls upon this Court to consider the constitutional limitations which the Due Process Clause of the fourteenth amendment imposes upon a state prosecutor in his summation to the jury.[2] The petition herein, contemporaneously pending with the petition in *DeChristoforo,* raises the identical issue under even more compelling circumstances.

DeChristoforo and a co-defendant were tried in the state court of Massachusetts on a charge of first degree murder. In the middle of the trial, the co-defendant entered a plea of guilty to second degree murder. The jury convicted *DeChristoforo* of first degree murder rejecting his defense that he had been an innocent bystander.

After his conviction was affirmed on appeal, DeChristoforo sought a writ of habeas corpus in federal court asserting that two statements in the prosecutor's summation deprived him of due process of law. The first was the prosecutor's expression of his personal belief in DeChristoforo's guilt. The second was the prosecutor's expression of his opinion that even DeChristoforo expected a conviction which, in light of his co-defendant's plea, suggested to the jury that DeChristoforo had sought to plead to a lesser offense and been refused. Since in fact no such plea offer had been made, the First Circuit reversed the district

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[2] Question presented: Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the fourteenth amendment to the Constitution. Petition for Writ of Certiorari, Donnelly v. DeChristoforo, No. 72-1570 at 2.

court's denial of the writ finding that the second statement conveyed a false impression and violated due process. 473 F.2d at 1240-41.[3]

After a jury trial in state court in Kentucky, petitioner was convicted of voluntary manslaughter arising out of the death of his wife. The jury imposed the maximum sentence of 21 years and the conviction was affirmed by the Court of Appeals of Kentucky. Without repeating the factual development of the petition, a review of the trial record demonstrates that guilt or innocence turned on the question of whether or not the death of petitioner's wife from a fractured skull resulted from an accidental fall or multiple blows to the head from a criminal agency.

The deceased was found in her bathroom in a pool of blood from an avulsing scalp wound. The state's evidence on the cause of death consisted of volatile and inflammatory photographs of the deceased and the testimony of two doctors who were not specialists in forensic pathology that the fatal head injuries were caused by multiple blows. Petitioner called two of the most eminent forensic pathologists in the country who testified to their conclusions separately reached that the death was from an accidental fall.

In his summation, the prosecutor, over objection, committed both of the improprieties noted by the First Circuit in *DeChristoforo*. He expressed his per-

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[3] While condemning the expression of personal opinion as unethical and improper, the First Circuit did not find that, standing alone, the expression by the prosecutor of his personal belief in the guilt of the accused constituted a violation of due process. 473 F.2d at 1238.

sonal belief in petitioner's guilt (612, 21a, 621, 27a)[4] and conveyed false impressions contrary to the evidence, including a reenactment of the crime during which he threw a bathroom stool across the courtroom suggesting without evidentiary support that it was the murder weapon. (619, 26a) In addition, the heart of the summation was an appeal to the passion of the jury marked by a blatant attempt to arouse sectional prejudice. He asserted that the doctors were paid perjurers and political hacks from New York and Pennsylvania who had come down to Kentucky to "pull the wool over the eyes" of a "dumb Kentucky jury" and that petitioner was able to procure such an advantage because of his money and the fact that his brother was a smart New York lawyer. (612-13, 21-22a) The prosecutor's inferences, improper as an appeal to sectional prejudice, were argued despite facts to the contrary in the trial record. (See, 361-64, 365-67, 390-91).

Thus, the close identity of issues between this case and *DeChristoforo* amply justify reconsideration of the denial of certiorari here. Full development of the question presented in *DeChristoforo* would be enhanced if the Court were to consider the instant case at the same time and thereby explore a wider range of abuses in prosecutorial summations.[5] The need for such

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[4] The record references are to the trial transcript. The summation is reproduced in the Appendix to the petition and is also cited by the "a" references.

[5] At the very lease, reconsideration of the denial of certiorari is justified in order to hold this case open pending the decision in DeChristoforo because if that decision upholds the First Circuit's finding that the prosecutor's closing argument violated due process of law, then identical issues preserved by this petition and contemporaneously pending would thereby be affected.

review is underscored by the disturbing increase in prosecutorial trial misconduct which strikes at the heart of the truth-determining process of our adversary jury system.[6] Moreover, each of the abuses petitioner raises—expression of personal opinion, argument misstating the record, and blatant appeals to passion or sectional prejudice—are capable of explicit proscription and will not result in requests for this Court's hindsight judgment on every summation by a federal or state prosecutor. By announcing definite guidelines, prosecutorial self-discipline in summation will be fostered and misconduct thinly disguised as rhetoric will be curbed.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

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[6] For example, in United States v. White, No. 73-1597 (2nd Cir. decided October 11, 1973), an appeal involving an allegation of improper summation, the Second Circuit noted "the frequency with which allegations of prosecutorial misconduct have come before this court," citing six cases in the last six months many of which involved the remarks of prosecutors in summation. Slip Op. at 114 n. 4.

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

WILLIAM E. MCDANIELS